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Fundamental Right to Vote: Yet another Supreme Court guarantee

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ABSTRACT

Universal Declaration of Human Rights in Article 21 recognizes right to vote as a human right of a national of a country. It is surprising that the world's largest democracy has no provision to recognize right to vote as a fundamental right. India has seen 18 Lok Sabhas. Constitution is amended 106 times till now and yet no amends were made in that regard. It took the apex court of the country to declare right to vote as a fundamental right by construing the sacred constitution. This paper traces the developments leading to the recognition of peoples' fundamental right to vote.

Keywords: PIL, Art 142, right to vote, Anti defection, electoral bonds, election commission

I. INTRODUCTION

November 2024 got Maharashtra a new Legislative Assembly and a new government. 18th Lok Sabha elections got over in this same year. We, as a nation, had yet another ceremonious general elections with 90 crore plus eligible voters for the 543 seats. Just a year ago SCI declared right to vote as a fundamental right in a PIL that ruled on what shall be the Committee to select the Election Commission of India's Commissioners.

In *Anoop Baranwal v UOI*² SC ruled on appointment of the Election Commission of India deciphering the constitutional silence through its power under Art 142³ of the Constitution of India. SC has laid down that till Parliament provides by law a committee of the Prime Minister, Leader of the Opposition and the Chief Justice of India will recommend appointments to Election Commission. The recognition of right to vote as a fundamental right has fortified the intervention requirement justifying the invocation of the special power.

SC has held that right to vote is an expression of the choice of the citizen, which is a fundamental right under Article 19(1)(a). Claiming the right as an indispensable tool shaping the destinies of people, the court said that it is reflected in Art 21. Reminding the right to vote of women and the oppressed classes that is protected under the Constitution, the court ruled

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² (2023) 6 SCC 161

³ Power of the Supreme Court to pass any order to do complete justice in a case

that the right to vote is not limited only to Article 326⁴, but flows through Article 15, 17, 19 and 21⁵. The court made a majestic declaration that subject to limitations prescribed by Article 326, the right to vote in direct elections is a fundamental right.

Constitution of India: The Constitution of the world's largest democracy does not expressly recognize right to vote as a fundamental right. Preambular promise of democracy is strengthened by provisions for an independent Election Commission of India, composition and term of the elected legislatures at the Centre and states and qualifications, privileges of the elected members of legislatures. However, the significant political right to vote is conspicuously absent from the Fundamental Rights Part of our Constitution. It is pertinent to note that B N Rao's report, K M Munshi's report for the Fundamental Rights Committee of the Constituent Assembly and Dr Baba Saheb Ambedkar's Memorandum submitted to the Advisory Committee of the Constituent Assembly incorporated right to vote as a citizen right. But in January 1947 upon an interim report, it was proposed to have all provisions on elections in a separate part and that was how the right slipped out of Part III-the Fundamental Rights Part.

II. MISSED PARLIAMENTARY EFFORTS

Part XV of the Constitution on Elections through Art 326 guarantees entitlement to be registered as a voter of all citizens of 18 years⁶ age and above unless disqualified on grounds of non-residence, unsoundness of mind, crime, corrupt or illegal practice. Art 325 bars the state from declining inclusion into the electoral roll of any citizen on grounds only of religion, race, caste, sex or any of them.

In 1985 by 52nd Amendment when anti defection law was introduced and in 1989 by 61st Amendment when the suffrage age was brought down to 18 from 21 there was no effort to raise the right as a fundamental right. Anti defection law respected the expectation of the citizen who voted a candidate on his/her party affiliation. However, there is no real way to assess whether the vote was cast for the candidate upon his/her individual merit or upon the merit of the party to which the candidate is affiliated. Undoubtedly the anti- defection law was premised on stability of government. The age reduction was to enlarge participation in decision making in the democracy. But the non-recognition of the right to vote as a fundamental right was left to continue.

⁴ INDIA CONST art 326.

⁵ INDIA CONST art 15 guarantees equality of citizens; Art 17 abolishes untouchability; Art 19 assures freedoms to citizens and Art 21 guarantees to every person life and liberty.

⁶ Till 61st Constitution Amendment Act, 1989 it was 21 years

Opportunity to recognize right to vote as a fundamental right was not grabbed when each time Constitution was amended to extend the period of reservation to SC and ST in the Lok Sabha and State Legislative Assemblies⁷. Opportunity was missed when the Constitution was amended by 73rd and 74th amendments to include local body elections for panchayats and corporations. Direct elections for Panchayats⁸ and Municipalities⁹ have been stipulated by these amendments. The latest 106th Amendment guaranteeing 33% reservation for women in Lok Sabha and State Legislative Assemblies also did not bring to light the right to vote as a fundamental right of the citizens of this country.

III. JUDICIAL EFFORTS

Supreme Court repeatedly ruled that right to vote was only a statutory right. Despite Articles 325 and 326 spelling out the entitlement to vote, the Supreme Court unfortunately refused to accept the right to vote as a political right under the Constitution and had dumped it as a creature of statute subject to limitations imposed by it¹⁰. In 2003, in *People's Union for Civil Liberties v UOI*¹¹ while considering the duty of candidates to furnish information, the SC rejected the stand that right to vote is a pure & simple statutory right. The court recorded a categorical conclusion that the right if not a fundamental right is certainly a constitutional right.¹² Also the majority judges in *Desiya Murpokku Dravida Kazhagam v ECI*¹³ did not disagree with the minority view that every citizen of this country has a constitutional right to both elect & also be elected to any of the legislative bodies created by the Constitution. In *Rajbala & Ors v State of Haryana*¹⁴ SC reiterated that right to vote in general elections as a constitutional right as conclusively decided in *People's Union for Civil Liberties & DMDK*. It further clarified that the observation in *Shyamdeo Prasad Singh v Nawal Kishore Yadav*¹⁵ and *K. Krishna Murthy v UOI*¹⁶ that it is well settled that right to vote & contest elections are only statutory rights was made *per incuriam*¹⁷.

It was in 2023 that the SCI recognized right to vote as a right flowing from Articles 15, 17, 19 and 21 read with Art 326 in the PIL praying for an independent recommending body in the

⁷Original 10 years' reservation has been continuously revised. Recently 104th Constitutional Amendment, 2019 has made it 80 years.

⁸ INDIA CONST art 243C(2)

⁹ INDIA CONST art 243R (1)

¹⁰ See, *Ponnuswami* AIR 1952 SC 64; *Jyoti Basu v Debi Ghosal*, AIR 1982 SC 983

¹¹(Right to know of the voters) AIR 2003 SC 2363

¹² Id para 123

¹³ (2012) 7 SCC 340

¹⁴ AIR 2016 SC 33

¹⁵ (2000) 8 SCC 46

¹⁶ (2010) 7 SCC 202

¹⁷ Per Incuriam means 'made in ignorance of a statute or a binding rule'.

appointment of the Chief Election Commissioner and other Election Commissioners.

It is quite salutary of the SC to have recognized right of the voters to know about the educational qualifications, assets, convictions, pending criminal charges of contestants in an election.¹⁸ The SC recognized the special facilities of ramps, braille voting machines and special care to their needs including sensitisation of the staff to make voting rights of persons with disability real.¹⁹ In the 2024 Lok Sabha elections and the State Assembly elections Election Commission has facilitated voting from home for the elderly and the disabled.

Further since 2016 voters have the right to choose NOTA if none of the candidates contesting from that constituency deserve their vote as per SC decision in *PUCL V UOI*²⁰. However, till date, there is no right to re-elect if NOTA wins.

Right of Non- Resident Indians (NRI): In 2010 Representation of People Act 1951 was amended to insert S 20A to enable enrolment of NRIs if eligible. NRI can register online too, However, Non -resident Indians could vote in elections only if they come to India. In *Nagender Chindham v UOI and ECI*,²¹ a pro bono petitioner claimed for absentee voting rights of the Indians living abroad. Under SC's direction a committee was appointed to see the modalities and implement absentee voting. ECI came up with e postal ballot; then was proposed a proxy voting. But nothing has emerged yet to facilitate overseas citizens to vote from where they are for employment, education or otherwise.

International Human Rights instruments such as UDHR²², International Covenant on Civil and Political Rights²³, and Convention on Elimination of all forms of Discrimination Against Women²⁴ have recognized right to vote of people in their nations. Regional instruments of European, American and African arrangements have also recognized this right²⁵. SC has always turned to international human rights jurisprudence to interpret fundamental rights.²⁶ The latest recognition of citizens' fundamental right to vote is a transcendental change.

¹⁸ *UOI V ADR*, AIR 2002 SC 2112

¹⁹ *Disabled Rights Group v Chief Election Commissioner*, W. petn (civil) No 187 of 2004. See https://ceomadhyapradesh.nic.in/Handbooks/Manual_on_Polling_Station_27052016.pdf p 48 last visited Oct 7, 2024

²⁰ 2013 10 SCC 1

²¹ https://www.livelaw.in/pdf_upload/2274201312039459order01-nov-2022-442531.pdf last visited Oct 9, 2024

²² UDHR Article 21

²³ ICCPR Article 25

²⁴ CEDAW Article 7

²⁵ See European Convention on Human Rights, American Convention on Human Rights, African Charter on Human and Peoples Rights

²⁶ See for example, *Vishaka v State of Rajasthan*, AIR 1997 SC 3011, *Vellore Citizens Forum v UOI*, AIR 1996 SC 2715

Electoral bonds and right to information: Recently in *ADR v UOI*²⁷ SC found the electoral bonds scheme unconstitutional in as much as it violated the people's right to information. Voter's right to know was held to supersede anonymity in political party funding. This judgement goes far to cleanse the electoral politics which is ridden with money power and muscle power.

Mobile Voting: In these ongoing elections senior citizens who are 85+ and persons with disability have been facilitated to vote from home²⁸. This is a giant leap forward.

Right of verification of votes: In a PIL, *ADR v Election Commission of India* and another²⁹ the petitioners prayed for going back to conventional paper ballot or to allow the voter to take the VVPAT slip and put in the box. Petitioners contend that voters have a fundamental right to verify that their vote has been 'recorded as cast' and 'counted as recorded' and pray for declaration of such right³⁰. In its judgement on 26th April 2024, SC backed the EVMs and rejected the prayer for 100% cross verification and return to conventional ballot box system. SC observed that EVM voting suitably satisfied the voter's right under Article 19(1)(a) to know that his/her vote has been counted as recorded³¹. The SC however required that post elections all the machines should be checked for any tampering upon the written request of candidates who secured second and third largest number of votes behind the successful candidate. The request should be made within 7 days and the cost will be upon the applicant unless tampering is detected.³² The 2025 Special Intensive Revision (SIR) of electoral rolls by the Election Commission of India that is claimed to ensure that only genuine citizens get voting rights is opposed as divesting people of the voting rights. The SIR as well as its opposition is fortified by the judgement of the SC that right to vote is a fundamental right.

²⁷https://main.sci.gov.in/supremecourt/2017/27935/27935_2017_1_1501_50573_Judgement_15-Feb-2024.pdf last visited Oct 6 2024

²⁸ECI walks the extra mile to reach at the doorstep of elderly and PwD voters, <https://pib.gov.in/PressReleasePage.aspx?PRID=2017764> last visited Oct 6 2024

²⁹https://main.sci.gov.in/supremecourt/2023/10857/10857_2023_2_1501_52646_Judgement_26-Apr-2024.pdf last visited Oct 7, 2024

³⁰<https://www.livelaw.in/top-stories/plea-for-100-evm-vvpat-verification-human-intervention-creates-problems-says-supreme-court-during-hearing-255233> last visited Oct 7, 2024

³¹ Id at p 50

³² Id at p 38